IS LAW THE EXPRESSION OF CLASS SELFISHNESS?

THIS question has received an affirmative answer, in the following unequivocal terms:

"The rules of the law are established by the self-interest of the dominant class, so far as it can impose its will upon those who are weaker."

There is no such thing as abstract legal principles or abstract justice, we are assured.

"The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class." [1]

In support of these propositions, the author refers to numerous decisions of the courts. The New York Court of Appeals [2] declared the state prohibitory liquor law of 1855 unconstitutional, so far as it destroyed the property in intoxicating liquors, owned and possessed by persons within the state, when the act took effect. On the other hand, the Supreme Court of the United States [3] upheld the constitutionality of the Kansas Prohibitory Liquor Law of 1881, which had been enacted to carry into effect the following provision of the Kansas Constitution, adopted by the people in 1880:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific and mechanical purposes."

The prevailing opinion in the former case, the author praises as "a model of lucid and logical reasoning." What has he to say of the Mugler decision and of other cases in accord with it? This:

"The liquor business being obnoxious and ill-defended, the courts abandoned it to its fate, and generally held that property in liquor may be confiscated." [4]

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[1] Brooks Adams in Centralization and the Law, 20, 45, 64.

[2] Wynehamer *v.* People, 13 N. Y. 392 (1856).

[3] Mugler *v.* Kansas, Kansas *v.* Ziebold, 123 U. S. 623, 8 Sup. Ct. 273 (1887).

[4] Brooks Adams in Centralization and the Law, 110.

That the liquor business was obnoxious to the majority of the citizens of Kansas must be admitted, but that Mugler and Ziebold were ill-defended is most surprising, for they had the services of George W. Vest and Joseph H. Choate. In another connection,[5] he declares: "The weak, like the brewer or the lottery seller, fare in proportion to their weakness." So far as the liquor business is concerned, statistics do not appear to bear out this charge. According to the census of 1850, the consumption of wines and liquors in the United States for that year was 94,712,853 gallons, while in 1880 it was 505,844,038 gallons. Certainly in the decisions referred to the liquor business did not fare in proportion to its weakness, for it was more than five times stronger in 1887 than in 1856.

In another set of decisions the author contrasts the rulings of the Supreme Court in certain elevator cases with those in certain railroad cases. His conclusion is that "these great roads represented a vast power and were protected accordingly," while the proprietors of the elevators "had not behind them an equal financial energy," [6] and therefore suffered the hard fate of the weak lottery seller and brewer.

This conclusion, it is submitted, is not in accordance with the facts. Justice Brewer, who dissented in the elevator cases, has declared,[7] that neither in Munn *v.* Illinois,[8] nor in Budd *v.* New York,[9] nor in Brass *v.* Stoeser,[10] was it

"charged or shown that the rates prescribed by the legislature were unreasonable, and the only question was the power of the legislature to interfere at all in the matter."

In the railroad cases, however, it was charged that the rates fixed by the statute of Nebraska were unreasonable and operated to deprive the railroad companies of their property without due process of law. The trial court found that this charge was sustained

[5] Brooks Adams in Centralization and the Law, 123.

[6] *Ibid.* 123, 124.

[7] Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 86, 22 Sup. Ct. 30, 33 (1901).

[8] 94 U. S. 113, 125 (1876). Chief Justice Waite pointed out that the regulation of rates did not necessarily deprive the elevator owner of his property; and that the Fourteenth Amendment simply prevents the States from doing that which will operate as such deprivation.

[9] 143 U. S. 517, 12 Sup. Ct. 468 (1892).

[10] 153 U. S. 391, 14 Sup. Ct. 857 (1894).

by the evidence, and the Supreme Court, after examining the evidence with great care, reached the conclusion

"that as to most of the companies in question, there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893: and that in the exceptional cases above stated, when two of the companies would have earned something above operating expenses in particular years, the receipts or gains above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution." [11]

No fair-minded person can read the set of cases referred to by Mr. Adams with any tolerance for the doctrine which he teaches. They do not furnish the slightest warrant for the assertion that the Supreme Court laid down one rule for grain elevators in Munn *v.* Illinois, and a different one in Smyth *v.* Ames for railroad companies, and did this because in the intervening years "the social equilibrium had shifted," and the investment in railways had increased from four and a half billions in 1876 to eleven and a half billions in 1898. Or, to use his words,

"As the social weight of railways has increased, so has the tenderness of the courts in regard to anything which may impair their revenue. . . . These great roads represented a vast power and were protected accordingly."

If that doctrine were sound, inasmuch as the total railway investment is now about eighteen billions, we should expect to find the Supreme Court going to all lengths in its protection of railway interests. In fact it maintains no such attitude. For example, the railroad companies have sought exemption from the Safety-Appliance Acts,[12] which seriously impair their revenue, but the

[11] Smyth *v.* Ames, 169 U. S. 466, 547, 18 Sup. Ct. 418, 434 (1898). In closing his opinion (and there was no dissent), Justice Harlan said: "It may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed for the better since the decree below, . . . In that event, if the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction," and enforce the statute.

[12] Act of March 2, 1893, amended March 2, 1903, 32 Stat. at L. 943, c. 976.

Supreme Court has sustained their constitutionality;[13] has declared that they impose an absolute duty on the railroads which cannot be escaped by the exercise of reasonable care,[14] and that they apply to cars used in moving intrastate traffic on a railway which is a highway of interstate commerce.[15]

The statement that litigants of "vast power are protected accordingly," while weak litigants "fare in proportion to their weakness," reads like a fairy tale in the light of such decisions, and of those in the Standard Oil [16] and in the Tobacco Trust Cases.[17] It might be dismissed as a fairy tale, but for the mischief that it breeds. If law is invariably on the side of the heaviest social battalions, all that is necessary to transform the law breaker into the law maker is to shift the social equilibrium — to change the minority into the majority so as to overawe the courts. Such a doctrine leads directly to the recall of judges, otherwise the will of the dominant class might be balked by a judiciary, holding office for a fixed term, or for the life of its members; especially if it were old-fashioned enough to believe that its sworn duty consisted in earnestly endeavoring to do justice in each case, not in accordance with the membership of the litigants in the dominant class, but in accordance with established principles of law.

In a jurisdiction where the recall of judges prevails, we might expect to find legal rules fashioned and enforced from notions such as are described in the following extract:

"The Anglo-American law as to this liability [the liability of employer to employed] contains three rules which would seem to have been adopted with the idea of protecting the interests of the employer rather than those of the employed. They were furthermore adopted at a time when the political influence of the employed was not as great as that of the employer, and when it was considered expedient, if not necessary, to encourage where possible the investment of capital in industrial enter-

[13] St. Louis, Iron Mountain, etc. Ry. *v.* Taylor, 210 U. S. 281, 295, 28 Sup. Ct. 616, 621 (1908): "It is said that the liability under the statute as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. . . . The argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interest of the employee and of the public."

[14] Chicago, B. & Q. Ry. *v.* United States, 220 U. S. 559, 31 Sup. Ct. 612 (1911).

[15] Southern Ry. *v.* United States, 222 U. S. 8, 32 Sup. Ct. 2 (1911).

[16] Standard Oil Co. *v.* United States, 221 U. S. 1, 31 Sup. Ct. 502 (1911).

[17] United States *v.* American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632 (1911).

prises. They are, first, that an employer is not liable to an employee for the damages caused by a co-servant; second, that the contributory negligence of an employee shall be an absolute bar to the recovery from an employer of damages in cases in which the employee, as well as the employer, has been guilty of negligence; and, finally, that where an employee has knowledge of unsafe conditions, and, notwithstanding that knowledge, continues his work, he is to be deemed to have assumed the risk of his conditions." [18]

It will be observed that the foregoing doctrine is very similar to that propounded by Mr. Adams. The judiciary adopts rules of law with the idea of protecting the dominant class. At least the three rules in question were adopted with that idea. This is a grave charge against the English and American courts. Is it valid?

That it cannot be sustained, so far as the contributory negligence rule is concerned, is clear. This rule antedates all fellow-servant controversies, and was fully established by judicial decisions in law suits to which employer and employed were not parties. To quote from Mr. Beven: [19]

"The case usually referred to as the first which definitely formulated the rule of law is Butterfield *v.* Forrester.[20] Plaintiff, who was riding violently, rode against an obstruction in the highway placed there by defendant, and was injured. Bayley, J., directed the jury that, if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find for the defendant; which they accordingly did."

The rule was restated and applied in numerous cases, both in England and in this country, during the next thirty years, without any reference to controversies between employed and employer.[21] When such controversies began to come before the courts, and the employer

[18] Social Reform and the Constitution, 251.

[19] Beven, Negligence, 3 ed., 150.

[20] 11 East 60 (1809).

[21] See Vanderplank *v.* Miller, M. & M. 169 (1828) (action for running down a ship); Lack *v.* Seward, 4 C. & P. 106 (1829) (collision of two barges); Vennall *v.* Garner, 1 Cromp. & M. 21 (1832) (running down a ship by another); Pluckwell *v.* Wilson, 5 C. & P. 375 (1832) (collision between wagons); Williams *v.* Holland, 6 C. & P. 23 (1833) (driving chaise against cart); Luxford *v.* Large, 5 C. & P. 421 (1833) (loaded wherry swamped by a steam vessel); Rathbun *v.* Payne, 19 Wend. (N. Y.) 399 (1838) (collision between canal boats); Hartfield *v.* Roper, 21 Wend. (N. Y.) 615 (1839) (running over a child unattended in the highway).

interposed the defense of contributory negligence against the employee, he was making no novel claim; he was not calling on the court for any class intervention on his behalf; and when the court upheld the defense, it was not adopting "a rule with the idea of protecting the interests of the employer rather than those of the employed." In one of the earliest cases,[22] in which an employer successfully set up the defense of contributory negligence of the employee, the court said:

"The negligent act was as much the act of the plaintiff as of the defendant's foreman, and no man can, in any case, be allowed to recover a compensation for damages resulting from his own misconduct or negligence. A plaintiff suing for negligence must himself be without fault."

The Supreme Court of Michigan dealt with this defense in the same way, when it was interposed for the first time in that state by an employer against an employee.

"Where no other considerations interfere, it is a well settled rule that a person who has by his own negligence so far contributed to the injury done him that he might by the use of ordinary diligence or care, have avoided it, has no right of action." [23]

No reference here to any novelty in the defense; no hint that the employer was invoking any principle peculiar to him or his class; no intimation by the court that it was formulating a rule in the interests of the employer. And not one of the authorities cited for the well-settled rule of contributory negligence, was connected with labor litigations.[24]

Equally true is it that the rule, referred to in the above quotation, concerning the assumption of risk by the employee, is not peculiar to labor litigation, and was not adopted by the courts "with the idea of protecting the interests of the employer rather than those of the employed." The legal principle applied in this

[22] Brown *v.* Maxwell, 6 Hill (N. Y.) 592 (1844).

[23] Mich. Cent. Ry. *v.* Leahey, 10 Mich. 193, 198 (1862), citing Butterfield *v.* Forrester, 11 East 60 (1809); Marriott *v.* Stanley, 1 M. & G. 568, 853 (1840) (plaintiff thrown against an obstruction put in the street by defendant); Clayards *v.* Dethick, 12 Q. B. 439 (1848) (plaintiff's horse killed while being led over a trench negligently left open by defendant).

[24] See cases in last note.

rule is very ancient. Mr. Beven[25] has traced its history from Homer, Aristotle, the Roman jurists and the Year Books to the present time. The topic is discussed very fully also by Mr. Labatt.[26] Both writers assure us that it had been accepted by the English courts as early as 1820, as authority for the rule that one who voluntarily exposes himself to a known and appreciated danger assumes the risk of the consequences. Both cite Ilott *v.* Wilkes[27] in support of this statement; and Mr. Labatt calls attention to the close resemblance of the language of the judges, in that case, "to that which has become so familiar in employers' liability cases."[28] Moreover, he emphatically declares that the maxim of *volenti non fit injuria* is one of universal application, and that whether it is or is not available in a particular case cannot be affected by the mere fact that the relations of the parties to the action were for some purposes defined by the contract. Accordingly, when discussing the rule relating to the employee's assumption of risk, he cites indifferently authorities in which the defendant was the plaintiff's employer and those in which he was a stranger.[29]

That he was quite justified in so doing cannot admit of doubt. The rule, that an employee who continues working in conditions known to him to be unsafe assumes the risk of those conditions, is the rule which is applied to a stranger who subjects himself to the same risk. For example: The plaintiff, a locomotive engineer, was injured by striking against an electric signal post, while leaning outside his locomotive and looking back to take a signal from the conductor. As the evidence showed that plaintiff knew the manner in which the road was constructed, and fully appreciated the danger attending his continuance in the unsafe conditions, he had assumed the risk and could not recover.[30] In another case, the plaintiff, a voluntary spectator at a display of fireworks, was injured by the explosion of a bomb. He was held to have assumed the risk of the unsafe conditions in which he voluntarily continued, and, therefore, to have barred himself from recovery.[31] A similar decision has

[25] Beven, Negligence, 3 ed., 632 *et seq.*; "Volenti non fit Injuria," 8 Journal of the Soc. of Comp. Leg. N. S. 185.

[26] 1 Labatt, Master and Servant, chap. 20.

[27] 3 B. & Ald. 304 (1820).

[28] 1 Labatt, Master and Servant, 971, note 4.

[29] *Ibid.* 969.

[30] Lovejoy *v.* Boston & Lowell Ry., 125 Mass. 79 (1878).

[31] Scanlon *v.* Wedger, 156 Mass. 462, 31 N. E. 642 (1892), followed in Frost *v.* Josselyn, 180 Mass. 389, 62 N. E. 469 (1902).

been made in New York against a voluntary spectator at an automobile race.[32] While these spectator decisions may be open to criticism on the ground that the defendants were engaged in illegal exhibitions, it is believed that no one has intimated that the rule of assumption of risk, which defeated the plaintiffs, was adopted with the idea of protecting the interests of fireworks exhibitors and auto-racers, rather than those of the spectators; nor that it was due to the fact that the political influence of the latter class was less than that of the former; nor that its genesis can be traced to the judicial disposition to encourage the investment of capital in the industrial enterprises connected with fireworks and automobiles.

Again the rule of assumption of risk which operates to defeat the employee who knowingly subjects himself to unsafe conditions, operates in the same way against a passenger riding on the front platform of a crowded electric car, knowing that there is a sign on the car stating a rule that "Passengers riding on the front platform do so at their own risk." [33] It operates, also, to defeat a pedestrian who voluntarily passes over an icy sidewalk, or street, knowing that it is dangerous, but believing that he can escape unharmed. He assumes the risk of the unsafe conditions.[34]

On the other hand, the rule does not operate to defeat the plaintiff, unless he assumes the risk; and it operates in the same way whether the particular plaintiff is a servant of the defendant or a stranger. To illustrate: A season-ticket holder on defendant's line of railway slipped on the steps leading down to the passenger platform and was injured. He knew that the steps were covered with snow, and somewhat slippery, and that he could have reached the platform by other steps. The jury found that he was not guilty of contributory negligence, and the court ruled that he did not assume the risk of the unsafe conditions, unless it was shown that "he freely and voluntarily, with full knowledge of the nature and

[32] Johnson *v.* City of New York, 186 N. Y. 139, 78 N. E. 715 (1906), followed in Bogart *v.* City of New York, 200 N. Y. 379, 93 N. E. 937 (1911).

[33] Burns *v.* Boston El. Ry., 183 Mass. 96, 66 N. E. 418 (1903), distinguishing cases where the defendant had waived the rule against standing on the platform.

[34] Wilson *v.* City of Charlestown, 8 All. (Mass.) 137 (1864); Wright *v.* City of St. Cloud, 54 Minn. 94, 55 N. W. 819 (1893); Friday *v.* City of Moorhead, 84 Minn. 273, 87 N. W. 780 (1901); Howey *v.* Fisher, 122 Mich. 43, 80 N. W. 1004 (1899): "It is apparent from this testimony that the plaintiff knew of the risk of passing over this icy way, and assumed the risk of doing so. . . . The precise danger was before her, and she had it in mind at the time."

extent of the risk he ran, impliedly agreed to incur it." [35] This case was cited by the Supreme Court of Massachusetts as precisely in point, where the plaintiff was a servant of defendant and had been injured by falling on slippery steps as she was leaving defendant's mill at the end of her day's work: [36]

"The rule which we are considering applies only when the plaintiff has voluntarily assumed the risk. . . . Mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk. . . . We are of the opinion that it cannot be said, as a matter of law, that the plaintiff in the present case, in attempting to go down the steps voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident."

In a case between an employee and an employer, the Supreme Court of New Hampshire, when setting aside a nonsuit of plaintiff, said:

"One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger. One cannot be said, as a matter of law, to assume a risk voluntarily, though he knows the danger and appreciates the risk, if at the time, he was acting under such an exigency, or such an urgent call of duty, or such constraint of any kind, as in reference to the danger deprives his act of its voluntary character; or if, after discovering the master's neglect, he has no opportunity to leave the service before the injury is received." [37]

It is submitted that the rule, as to assumption of risks incident to unsafe conditions, was not adopted with the idea of protecting the interests of the employer rather than those of the employed. On the contrary, it antedates labor litigation and always has been applied in accordance with the same principles, whether the plaintiff was a servant or a stranger.

Let us pass to a consideration of the remaining rule alleged to have had its origin in judicial favoritism for employers. In the passage heretofore quoted, it is formulated thus: "An employer is not liable to an employee for the damage caused by a co-servant."

Perhaps the first comment that should be made is that "Anglo-

[35] Osborne *v.* London & Northwestern Ry., 21 Q. B. D. 220, 224 (1888).

[36] Fitzgerald *v.* Conn. Riv. Paper Co., 155 Mass. 155, 159, 162, 29 N. E. 464 (1891).

[37] English *v.* Amidon, 72 N. H. 301, 56 Atl. 548 (1903).

American law" does not contain and never has contained that unqualified rule.[38] The reports are replete with cases where the employer has been held liable, and has been compelled to pay an employee, for damages caused by a co-servant. If the harm-doing co-servant is incompetent or reckless, and defendant knew or ought to have known this, and the harm to plaintiff resulted from such unfitness, the master is liable.[39] He is liable, too, if the injury is due to an insufficient number of co-servants.[40] Again, if plaintiff's injury is due to a co-servant's neglect to perform the duty assigned him by the defendant of promulgating proper rules for the conduct of the defendant's business, the latter is liable.[41] So is he liable if the employee's injury is owing to a co-servant's failure to perform the duty assigned him of providing a safe working place for the plaintiff,[42] or safe tools and machinery with which

[38] See Lord Brougham's remark upon a similar misstatement of the rule by Lord Ardmillan: "But, my Lords, it is utterly unknown to the law of England, also." Bartonshill Coal Co. *v.* McGuire, 3 Macq. 300, 313 (1858).

[39] Gilman *v.* Eastern Ry. Co., 10 All. (Mass.) 233 (1865); Metropolitan El. Ry. *v.* Fortin, 203 Ill. 454, 67 N. E. 977 (1903), affirming a judgment for $15,000 in the employee's favor; Walker *v.* Bolling, 22 Ala. 294 (1853); Cook *v.* Parham, 24 Ala. 21 (1853); Brown *v.* Levy, 108 Ky. 163, 55 S. W. 1079 (1900); Poirier *v.* Carroll, 35 La. Ann. 699 (1883), recovery for $2500; Laning *v.* N. Y. Cent. Ry., 49 N. Y. 521 (1872), sustaining a verdict for $10,000. Judge Folger's opinion is worthy of careful reading by anyone who would understand the conscientious striving of the judiciary to do its duty in this class of cases.

[40] Flike *v.* B. & A. Ry., 53 N. Y. 549 (1873). Defendant had appointed sufficient brakemen to go with the train which parted and caused the injury, but one of them neglected to go. The negligence of the company consisted in not seeing to it that the train was sufficiently manned when it started, and it did not excuse itself by showing that if Loftus, the brakeman, had done his duty, the train would have been fully manned. The employer, not the co-employee of Loftus, assumed the risk of the latter's neglect of duty.

[41] Han. & St. J. Ry. *v.* Fox, 31 Kan. 586, 596, 3 Pac. 320 (1884), affirming judgment for $10,000 in favor of employee; Pool *v.* Southern Pac. Ry., 20 Utah 210, 220, 58 Pac. 326 (1899), affirming judgment for $12,000 in favor of employee's administratrix; Madden *v.* Ry. Co., 28 W. Va. 610 (1886), sustaining verdict of $6000.

[42] Kansas City, etc. Ry. *v.* Kier, 41 Kan. 661, 21 Pac. 770 (1899), recovery for $7000; Breckenridge Co. *v.* Hicks, 94 Ky. 362, 22 S. W. 554 (1893), judgment for $4000 in employee's favor affirmed; Snow *v.* Housatonic Ry., 8 All. (Mass.) 441, 447 (1864); Babcock *v.* Old Colony Ry., 150 Mass. 467, 23 N. E. 325 (1890); Donahue *v.* Boston & Me. Ry., 178 Mass. 251, 254, 59 N. E. 663 (1901), recovery for $6500; Balhoff *v.* Mich. C. Ry., 106 Mich. 606, 65 N. W. 592 (1895); Drymala *v.* Thompson, 26 Minn. 40, 1 N. W. 255 (1879); Henry *v.* Wabash West. Ry., 109 Mo. 488, 494, 19 S. W. 239 (1891); Cavanaugh *v.* O'Neill, 27 N. Y. App. Div. 48, 51, 50 N. Y. Supp. 207 (1898), affirmed without opinion in 161 N. Y. 657, 57 N. E. 1106 (1900); Chesson *v.* John L. Roper L. Co., 118 N. C. 59, 61, 23 S. E. 925 (1896); Calvo *v.* Railway Co., 23 S. C. 526

to work,[43] or of properly warning him of danger attending the work.[44] The authorities cited for the master's liability in such cases could be multiplied many times.

It is quite clear, therefore, that the quotation given above does not correctly state the fellow-servant rule. The master's exemption from liability to a servant for the negligence of a fellow servant is not unqualified. On the contrary it is conditioned upon his having performed his legal duties towards the plaintiff. The existing rule is often criticized, as throwing the entire risk of fellow service upon the employee. The foregoing authorities show that this criticism is unwarranted. Every large employer of labor takes the risk of his servants' negligence, even towards fellow servants, in doing numberless acts which he has deputed to them, and must necessarily depend upon them to do. That risk the much-abused common law fastens upon him. A servant does not assume the risk of a co-servant's negligence in providing unfit fellow servants, or an insufficient number of fit ones; nor in providing a safe place to work; nor in providing safe tools; nor in formulating proper rules; nor in giving due warning of danger. And these, as the law reports show, embrace a large proportion of the risks of fellow service.

Returning now to the fellow-servant rule, as thus limited, let us inquire whether there is any evidence to sustain the charge that it was "adopted with the idea of promoting the interests of the employer rather than those of the employed." It is to be borne in mind that we are not now concerned with the wisdom or folly

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(1885); Openshaw *v.* Railway Co., 6 Utah 132, 136, 21 Pac. 999 (1889), affirming judgment for plaintiff for $5000; Moon's Admr. *v.* R. & A. Ry., 78 Va. 745, 752 (1884); B. & O. Ry. *v.* McKenzie, 81 Va. 71, 77 (1885); McDonough *v.* Great Northern Ry., 15 Wash. 244, 257, 46 Pac. 334 (1896); Davis *v.* Cent. Vt. Ry., 55 Vt. 84 (1882), sustaining verdict for $5000.

[43] Hough *v.* Railway Co., 100 U. S. 213 (1879); Northern Pac. Ry. *v.* Herbert, 116 U. S. 642, 6 Sup. Ct. 590 (1885), affirming judgment for $15,000 in employee's favor; Union Pac. Ry. *v.* Daniels, 152 U. S. 684, 14 Sup. Ct. 756 (1894), affirming s. c. 6 Utah 357, 23 Pac. 762, upholding employee's verdict for $10,000; Port Blakely Mill Co. *v.* Garrett, 97 Fed. 537 (1899), affirming judgment for $5000; Fuller *v.* Jewett, 80 N. Y. 46 (1880).

[44] Tedford *v.* Los Angeles Tel. Co., 134 Cal. 76, 66 Pac. 76 (1901), sustaining verdict for $15,000; Daly *v.* Kiel, 106 La. 170, 30 So. 254 (1901), affirming judgment for $1500; Bjbjian *v.* Woonsocket R. Co., 164 Mass. 214, 41 N. E. 265 (1895); Brennan *v.* Gordon, 118 N. Y. 489, 23 N. E. 810 (1890); Kielley *v.* Belcher Silver Min. Co., 3 Sawy. (U. S.) 437 (1875); The Pioneer, 78 Fed. 600 (1897), sustaining a verdict for $5000.

of the rule, but with its genesis. Does it owe its existence to the political weakness of the employed and to the disposition of courts to encourage the investment of capital in industrial enterprises? Is it the expression of class selfishness by judges who were members of that class?

A satisfactory answer requires a careful examination of the leading cases on this topic. Such an investigation is somewhat tedious but it ought to yield safer results than the most brilliant speculation.

The first attempt under English common law to hold a master liable to a servant for the negligence of a co-servant, was made in Priestley *v.* Fowler.[45] The plaintiff was injured by the breaking of a butcher's van on which he was riding pursuant to the directions of its owner, who was his master as well as the master of the "conductor" of the van. Plaintiff's counsel contended that there was "no valid distinction between this case and that of an ordinary coach passenger"; and that defendant was liable even though he did not know that the van was overloaded. This view was rejected by the court. Lord Abinger, speaking for a unanimous court,[46] pointed out some of the absurd and inconvenient consequences which he believed would follow from the adoption of the principle contended for by plaintiff. Most of them relate to the every-day experience of the ordinary head of a family, and not one reveals any thought on the part of the judges, that their refusal to sustain this absolutely novel action would tend to encourage the investment of capital in industrial enterprises.

The next case in chronological order is Murray *v.* Railroad Company.[47] Plaintiff, a fireman in defendant's employ, claimed to have been injured through the negligence of the engineer, and

[45] 3 M. & W. 1 (1837). Lord Abinger said, at p. 5, "It is admitted that there is no precedent for the present action by a servant against a master."

[46] The court consisted of Lord Abinger, C. B., and Barons Parke, Bolland, Alderson and Gurney. The correlative duties of master and servant are referred to at p. 6: "The master is no doubt bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself."

[47] 1 McMul. (S. C.) 385 (1841). As Priestley *v.* Fowler is not referred to by counsel or judges, it is safe to conclude that the decision was not brought to the attention of the South Carolina court. The judges of this court were elected by the members of the two houses of the legislature, and held office during good behavior.

recovered a verdict of $1500, under the charge of the trial judge, that if the engineer did his duty so carelessly as to subject plaintiff to unnecessary danger which he could not avoid, the company would be liable. On appeal, the Court of Errors, by a vote of seven to three, held that the charge was erroneous and ordered a new trial. It may be noted, in passing, that the dissenting, as well as the prevailing, opinions agree that contributory negligence on the plaintiff's part would bar a recovery, and that he assumed "the ordinary risks and perils of the employment." Nothing can be found in any of the opinions indicative of judicial bias in favor of employers, nor does the argument for the defendant (which is printed in full) ask for any favors to his client or to the class to which that client belonged.[48] The decision was placed upon three grounds: First, that there was no "precedent suited to the plaintiff's case, unless he stands in the relation of a passenger to the company." Second, that plaintiff's contention that he was a passenger, when injured, was unsound, and that he was not entitled to the rights of a passenger against the defendant. Third, that it was not incident to plaintiff's contract of hiring that the company should guarantee him against the negligence of his co-servants.

Next comes Farwell *v.* Boston & Worcester Ry.,[49] in which the fellow-servant doctrine received its classical exposition in a carefully prepared opinion by Chief Justice Shaw. In this case plaintiff's counsel did not claim that his client was a passenger, as did counsel in Priestley *v.* Fowler and Murray *v.* Railroad Company.

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[48] 1 McMul. (S.C.) 388–398. Defendant's counsel reminded the court that a correct decision in the case was of less account to the railroad than to the public. "The company can make its contracts with its servants so as to avoid liability, if the verdict should be sustained." Much of his argument is addressed to showing that public security would not be promoted by the doctrine contended for by the plaintiff. He lays much stress upon the novelty of the action. After stating that defendant warranted to plaintiff that its road was in ordinary repair, that its engine was good, and the engineer competent, and that it would be liable to him for an injury due to its fault in any of these respects, he adds, "But the company cannot be supposed to warrant that each servant shall always be watchful, and that no servant shall be injured by the negligence of another."

[49] 4 Met. (Mass.) 49 (1842). The members of the court were appointed by the Governor with the consent of the Council, to hold office during good behavior. The case was argued upon an agreed state of facts, one of which was that plaintiff received higher wages as an engineer than he had received as machinist. Another was that plaintiff when he entered defendant's employment knew the switchman, and knew that he was a careful and trustworthy servant.

In fact, he admitted that those cases were rightly decided, since the plaintiff "was jointly engaged in the same service with the other servant, whose negligence caused the injury" and therefore, it might reasonably be inferred that they took "the hazard of injuries from each other's negligence." He insisted, however, that Farwell, as engineer, was engaged in a distinct employment from that of the switchman whose negligence caused plaintiff's injury, and that "a master, by the nature of his contract with a servant, stipulates for the safety of the servant's employment, so far as the master can regulate the matter." If we pass to the argument for defendant [50] and to the opinion of the court, we shall find no more trace of class partisanship than in the argument by plaintiff's counsel. The plaintiff was defeated because there was no precedent for his action, and because "considerations as well of justice as of policy" precluded the court from accepting the rule contended for by the plaintiff. It could find no ground upon which to base an implied promise of indemnity by the master to a servant against the negligence of fellow servants, where the master was without fault. The liability of a master to strangers for the negligence of a servant stands on its own reasons of policy. To extend that liability to co-servants would not conduce to the general good. The plaintiff had voluntarily left a position as machinist, and entered upon his employment as engineer, for higher wages, and with full knowledge of the risks incident to the latter employment. The injury must be deemed the result of an accident, not of a breach of duty owing by the defendant to the plaintiff. Such is the view of the court.

Justice Holmes has expressed the opinion that "few have lived who were Chief Justice Shaw's equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest *magistrate* which this country has produced." [51] It may be that the great magistrate's "understanding of the grounds of public policy" failed him in the Farwell case;

[50] 4 Met. (Mass.) 53–55. Counsel for defendant contended that the risk of passengers would be increased if the principle contended for by plaintiff was adopted, for it would diminish the caution of railroad servants. He also insisted that the plaintiff was paid higher wages because of the increased risk which he had assumed, including the risk of co-servants' negligence.

[51] The Common Law, 106. The italics are the author's.

that his conceptions of "justice and policy" and of the principles which best "conduce to the general good," were egregious blunders; but it is certain that he nowhere betrays any disposition to formulate a rule which should protect the employer rather than the employed, or one which should encourage the investment of capital; nor does he appear to be swayed by the political influence of the employer class. Indeed, he did not understand that he was taking part in the adoption of a new rule at all. He was simply expounding established principles of the common law.

That Chief Justice Shaw did not blunder in the Farwell case was the accepted view of the bench and bar for a generation. Not only was his opinion treated in this country as unassailable, but it received the rare compliment of being followed by the House of Lords and reprinted in a volume of its reports.[52] Two years after the Farwell decision, the Supreme Court of New York declared that it "entertained no doubt of its correctness." [53] A few years later it was unhesitatingly followed by the New York Court of Appeals.[54] Meanwhile the Supreme Court of Georgia accepted the doctrine of the Farwell case but declined to apply it against the owner of a slave, who had been killed by the negligence of defendant's free servants, on the ground that "slaves dare not intermeddle with those around, embarked in the same enterprise with themselves." [55] Later, it was not only accepted but applied in that state in the case of a free fellow servant.[56]

The Supreme Court of Ohio was divided in the first fellow-servant case that came before it,[57] but later accepted the Farwell doctrine, with the qualification that the servants are engaged in a

[52] 3 Macq. 316–322 (1858).

[53] Brown *v.* Maxwell, 6 Hill (N. Y.) 592 (1844). The members of this court were appointed by the governor.

[54] Coon *v.* Syracuse & Utica R. Co., 5 N. Y. 492 (1851), affirming s. c. 6 Barb. (N. Y.) 231 (1849). The judges of these courts were elected by popular suffrage. At p. 495 of 5 N. Y. Gardiner, J., said: "To the elaborate opinion of Chief Justice Shaw, nothing can be added without danger of impairing the force of his reasoning." In the court below, Pratt, J., remarked, "The correctness of these decisions [in the Farwell and Priestley cases] was not seriously questioned by the able counsel for the plaintiff, upon the argument of this cause." 6 Barb. (N. Y.) 236.

[55] Scudder *v.* Woodbridge, 1 Kelly (Ga.) 195 (1846).

[56] Shields *v.* Yonge, 15 Ga. 349 (1854). The members of this court were elected for three years by popular suffrage.

[57] Little Miami R. Co. *v.* Stevens, 20 Oh. 415 (1851). The judges were appointed to office for a term of seven years, by joint ballot of the two houses of the legislature.

common employment and are of equal rank.[58] The doctrine was accepted also by the Supreme Court of Louisiana in 1851,[59] by the Alabama Supreme Court in 1853,[60] and the following year by the Supreme Court of Pennsylvania in an opinion of commanding ability.[61] During the same year the Illinois Supreme Court accepted it,[62] followed a few months later by the highest court of Indiana.[63] Whether the reasons assigned by these courts, and quoted in the

[58] Cleveland, etc. R. Co. *v.* Keary, 3 Oh. St. 201 (1854); Whaalan *v.* Mad River, etc. R. Co., 8 Oh. St. 249 (1858). The judges, during this period, were elected by popular suffrage for terms of seven years.

[59] Hubgh *v.* New Orleans & C. R. Co., 6 La. Ann. 495 (1851), questioned by a part of the court in Camp *v.* Church Wardens, 7 La. Ann. 321 (1852), but now admitted to be correct. Weaver *v.* Goulden Logging Co., 116 La. 467, 471, 473, 40 So. 798 (1906). The judges in 1851 and 1852 were elected by white male suffrage. In the Camp case will be found a full discussion of French decisions bearing on the topic, as well as of the provisions of the Louisiana Code.

[60] Walker *v.* Bolling, 22 Ala. 294 (1853), although the defendant was held liable because of the unfitness of the negligent co-servant. The judges were elected for a term of six years by the joint ballot of both houses of the legislature.

[61] Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384 (1854). Said the Court: "The argument that the law implies a warranty that one servant shall not be injured by the carelessness of another, is only another way of stating the proposition that the law imposes the duty of protection on the master, which implies the relation of dependence on the part of the servant. . . . Such a rule could have very little application to great corporations, for they would immediately act on the maxim, *conventio vincit legem*, and provide against it in their contracts. But it would live to embarrass the more private and customary relations, and be the source of abundant litigation." The judges were elected by popular suffrage for a term of fifteen years.

[62] Honner *v.* Ill. Cent. R. Co., 15 Ill. 550 (1854); Ill. Cent. R. Co. *v.* Cox, 21 Ill. 20 (1858). After citing many authorities in support of the doctrine, the court expressed its approval of it as correct upon principle, declaring that it operated to make servants prompt and vigilant in reporting unfit or negligent co-servants. It was in accord, too, with the implied contract of the servant who calculates the hazards incident to a business in which he engages. "This we see every day — dangerous service generally receiving higher compensation than a service unattended with danger or any considerable risk of life or limb." The judges were elected by popular suffrage.

[63] Madison, etc. R. Co. *v.* Bacon, 6 Ind. 205 (1855): "It is considered that public policy requires that servants engaged in a common employment should not have an action against their principal for injuries resulting from the negligence of one or more of such servants; because the tendency of such a doctrine is to make them anxious and watchful and interested for the faithful conduct of each other, and careful to induce it; while the opposite doctrine would tend in a different direction. The safety and welfare of the public, therefore, demand the establishment of the non-liability principle on the part of the employer in such cases; while, when established, it can work no injury to the servant, because his entering upon the service is voluntary, is with a knowledge of its hazards, and with a power and right to demand such wages as he shall deem compensatory." The judges of the court were elected by popular suffrage.

notes, are sound or unsound when tested by modern economic theories, is quite irrelevant to our present inquiry. They were the reasons which influenced judicial action.

They were approved by the Supreme Court of Vermont, in a case which also held the master liable to a servant for injury due to the failure of other servants to inspect and repair a defective engine.[64] These reasons were repeated by the Supreme Court of Maine, when declaring that

"at common law an action for damages by a servant for an injury occasioned by the carelessness of a fellow servant in the same service, cannot be maintained against their common employer unless there be some contributing fault on his part." [65]

They appear again in a Delaware case,[66] as supporting "a general principle of law," as they do in a North Carolina case, the following year, which calls attention, also, to the oft-noted fact that there was no common-law precedent for such an action as the plaintiff had brought.[67]

The Supreme Court of New Hampshire subjected the fellow-servant doctrine to a very careful study and reached the conclusion that

"the law on this subject is not peculiar to common carriers, railroads, or extensive enterprises. The responsibilities of the defendants, in this case, and of the individual who hires two laborers in harvest, or two carpenters to erect a staging and shingle his house, are to be determined by the same legal tests. . . . The servant has agreed to bear, and is paid for bearing the risks incident to the service; the stranger has not made such an agreement, and is not paid for bearing such risks." [68]

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[64] Noyes *v.* Smith, 28 Vt. 59 (1855). The judges were chosen by the two houses of the legislature and the council for a term of two years. See Fox *v.* Sandford, 4 Sneed (Tenn.) 36, 47 (1856). Judges were elected by white male suffrage.

[65] Carle *v.* Bangor, etc. Canal & R. Co., 43 Me. 269 (1857). The judges were appointed by the governor with the consent of the council for four years.

[66] Flinn *v.* Philadelphia, etc. R. Co., 1 Houst. (Del.) 469, 496 (1857). Judges appointed by the governor and held office during good behavior. The doctrine is again recognized in Taylor *v.* Bush & Sons Co., 6 Pennewill (Del.) 306 (1907).

[67] Ponton *v.* Wilmington, etc. R. Co., 51 N. C. 245 (1858). Judges were appointed by the governor to hold office during good behavior.

[68] Fifield *v.* Northern Railroad, 42 N. H. 225, 238, 239 (1860). The defendant's demurrer was overruled, as plaintiff charged that his injury was due to defendant's failure to provide a safe place to work as brakeman. For such failure, whether through the negligence of a manager or a co-servant, defendant was liable. Judges were appointed by governor and council.

Wisconsin shows considerable judicial vacillation on this subject. In Chamberlain *v.* Mil. & Miss. R. Co.[69] the Supreme Court approved a charge of the trial court laying down the prevailing doctrine. When the case came before the court a second time, a majority rejected that doctrine,[70] but it was reinstated by a divided court a few years later.[71] This last change of view was induced, said Dixon, C. J., by

"the unbroken current of judicial opinion. At the time the second decision was announced, it was supposed that its doctrine had been or would be sustained by the courts of Ohio and Indiana; but by the reports which have more recently reached us it appears that they hold the very opposite, so that now the case (in 11 Wis.) stands alone in opposition to the decisions of all the courts of both countries, and I think, with Justice Cole, that it must be overruled."

From this time on the current of judicial opinion in the state courts of last resort continues unbroken, although individual judges criticized the accepted doctrine now and then; and in a few jurisdictions it suffered minor modifications.[72]

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[69] 7 Wis. 425 (1859). [70] 11 Wis. 238 (1860).

[71] Moseley *v.* Chamberlain, 18 Wis. 700, 705 (1860). The judges were elected by popular suffrage.

[72] McDermott *v.* Pacific R. Co., 30 Mo. 115 (1860). Judges were elected by white male suffrage. Sullivan *v.* Miss. & Mo. R. Co., 11 Ia. 421, 427 (1860). Judges elected by popular suffrage. Michigan Cent. R. Co. *v.* Leahey, 10 Mich. 193, 199 (1862). Judges elected by popular suffrage. O'Connell *v.* B. & O. R. Co., 20 Md. 212, 221 (1863). Judges appointed by the governor with the consent of the senate. Harrison *v.* Central R. Co., 31 N. L. J. 293, 296 (1865). Judges appointed for six years by the governor with the consent of the senate. Louisville & Nash. R. Co. *v.* Collins, 63 Ky. 114 (1865). Doctrine limited to co-equal servants. Judges elected for eight years by white male suffrage. Burke *v.* Norwich, etc. R. Co., 34 Conn. 474 (1867). The soundness of the doctrine is questioned, but the court accepts it as well established. Judges appointed by the general assembly for eight years. Foster *v.* Minn. Cent. R. Co., 14 Minn. 360, 362 (1869). Judges elected by popular suffrage. Dow *v.* Kan. Pac. Ry. Co., 8 Kan. 642, 645–646 (1871). The fellow-servant rule is approved as in accordance with "both authority and reason" and as securing the personal safety of passengers and "insuring the most skillful and trustworthy agents and servants." Judges elected by popular suffrage. Yeomans *v.* Contra Costa, etc. Co., 44 Cal. 71, 81 (1872). Judges elected by popular suffrage. N. O., J. & G. N. R. Co. *v.* Hughes, 49 Miss. 258 (1873). The fellow-servant doctrine, after a careful examination of authorities, is approved, because it safeguards the public without injustice to the employee. Judges appointed by the governor with the consent of the senate. Summerhays *v.* Kan. Pac. R. Co., 2 Colo. 484, 488 (1875). Judges elected by popular suffrage. Price *v.* Houston, etc. Nav. Co., 46 Tex. 535, 537 (1877). Judges elected by popular suffrage. Little Rock, etc. R. Co. *v.* Duffey, 35 Ark. 602, 613 (1880). Judges elected by popular suffrage.

The doctrine appears to have been brought before the United States Supreme Court for the first time in 1873, but the court found its discussion unnecessary in either of the pending cases. In one,[73] the relation of servant and master did not exist between the plaintiff and defendant, at the time of injury; and in the other,[74] the plaintiff was the father of the injured servant, and "the injury did not occur while the boy was doing what his father engaged he should do." That the court felt no partisanship for corporation employers, however, is apparent from the following language in the second case:

Chicago, etc. Ry. Co. *v.* Lundstrom, 16 Neb. 254 (1884). Modifies the prevailing doctrine by permitting a servant to recover against the master for negligence of a superior servant. Judges elected by popular suffrage. Willis *v.* Oregon Ry. & Nav. Co., 11 Or. 257, 263, 4 Pac. 121 (1884). Judges elected by popular suffrage. Moon's Admr. *v.* R. & A. R. Co., 78 Va. 745 (1884). Judges elected by joint assembly of the two houses. Madden's Admr. *v.* C. & O. Ry. Co., 28 W. Va. 610 (1886). General doctrine accepted as one of common law, but does not apply when the negligent co-servant acts in a superior capacity to the plaintiff in regard to some duty due to the master. Judges elected for twelve years by popular suffrage. Gaffney *v.* N. Y., etc. R. Co., 15 R. I. 456, 459, 7 Atl. 284 (1887). Judges elected by the general assembly and hold office during its pleasure. Openshaw *v.* Utah, etc. R. Co., 6 Utah 132, 21 Pac. 999(1889); Daniels *v.* Union Pacific Ry. Co., 6 Utah 357, 23 Pac. 762 (1890); Dryburg *v.* Mercer Gold Mining, etc. Co., 18 Utah 410, 55 Pac. 367 (1898). In the last cited case the court reviews the history of the fellow-servant doctrine, criticizes Chief Justice Shaw's opinion, and concludes that fellow servants are those who "are working together at the same time and place and to a common purpose," applying Rev. Stat. § 1343. The cases in 6 Utah were decided by judges appointed by the President; that in 18 Utah by judges elected by popular suffrage. The Daniels case was affirmed by the Supreme Court, 152 U. S. 684, 14 Sup. Ct. 756 (1894), on the ground that the negligent servant had failed to provide safe instrumentalities for the plaintiff. McBride *v.* Union Pac. Ry. Co., 3 Wyo. 247, 21 Pac. 687 (1889). Judges appointed by the President. Parrish *v.* Pensacola, etc. R. Co., 28 Fla. 251, 278 (1891). Judges elected by popular suffrage. Ell *v.* Northern Pac. R. Co., 1 N. D. 336, 48 N. W. 222 (1891). The opinion of Corliss, C. J., gives unqualified approval of the fellow-servant doctrine as just, wise and beneficial to the public at large, as well as a correct deduction from common-law principles. Judges elected by popular suffrage. Lutz *v.* Atl. & Pac. R. Co., 6 N. M. 496, 30 Pac. 912 (1892). Accepts the doctrine without hesitation as sound common law, and holds that it had not been affected by §§ 2308–2310 of Comp. Laws. Judges appointed by the President. Gates *v.* Chic., Mil. & St. P. R. Co., 2 S. D. 422, 50 N. W. 907 (1892). Judges elected by popular suffrage. Zintek *v.* Stimson Mill Co., 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055 (1893). Judges elected by popular suffrage for six years. McDonough *v.* Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334 (1896), but sustaining recovery because defendant had failed to provide a safe place to work. Goodwell *v.* Mont. Cent. Ry. Co., 18 Mont. 293, 45 Pac. 210 (1896). Judges elected by popular suffrage. Ruemmeli-Braun Co. *v.* Cahill, 14 Okl. 422, 79 Pac. 260 (1904). Judges appointed by the President.

[73] Packet Co. *v.* McCue, 17 Wall. (U. S.) 508 (1873).

[74] Railroad Company *v.* Fort, 17 Wall. (U. S.) 553, 557–558 (1873).

"This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

The fellow-servant doctrine did receive careful consideration from the Supreme Court in Hough *v.* Railway Company.[75] It was dealt with as a doctrine dependent upon principles of general law, and not controlled by the decisions of the state courts. Nevertheless the court reached the conclusion which had been reached with substantial unanimity by the state courts. That the judges were not accepting a rule "with the idea of protecting the interests of the employer rather than those of the employed," must be admitted by anyone who reads the opinion in which Justice Harlan spoke for a unanimous court. It is clear that the dominant motive, plainly expressed, is to formulate a doctrine which should be as nearly just as possible to both employee and employer; and the decision in the particular case was in favor of the employee.

This review of judicial decisions shows that the fellow-servant rule is not a product of judicial legislation. It is simply a formulation of common-law doctrine that had been tacitly accepted by

[75] Hough *v.* Railway Co., 100 U. S. 213 (1879). At pp. 217 and 218, the court expressly declares that the master is bound to exercise due care in providing reasonably safe instrumentalities in his business and in maintaining them in such condition; and that he cannot in respect of such matters interpose between himself and the servant, who has been injured without fault on his part, the personal responsibility of an agent who in exercising the master's authority has violated the duty he owes as well to the servant as to the master.

the bench and bar, until near the middle of the nineteenth century. It did not deprive the employee of any right theretofore accorded him by English law, or claimed by him. The novelty was not in the doctrine expounded in the cases above reviewed, but in the plaintiff's statement of a cause of action. The books contained no precedent for his declaration. In the two earliest cases [76] he sought to recover in the capacity of a passenger. Clearly, his master did not sustain the relation to him of common carrier. In the next case,[77] he abandoned the ground taken by his predecessors and based his action on an implied contract of indemnity with his employer. Just as clearly he was wrong again. The unanimity with which American courts accepted the fellow-servant doctrine is most persuasive evidence that it was an accurate deduction from common-law principles. Whether the judges were appointed by the governor, or chosen by the legislature, or elected by popular suffrage; whether their term of office was for life, or a short term of years, or during the pleasure of the electors; whether they were Websterian Whigs, or Jacksonian Democrats, or Lincoln Republicans; whether serving an Eastern, or a Western, or a Northern or a Southern community, everywhere and always the courts were agreed that the fellow-servant rule was only the formulation of common-law doctrine.

Such has been the opinion in England. To quote from Lord Cranworth: [78]

"That this is the view of the subject in England cannot I think admit of doubt. It was considered by the Court of Exchequer in Priestley *v.*

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[76] Priestley *v.* Fowler, 3 M. & W. 1 (1837); Murray *v.* Railroad Co., 1 McMul. (S. C.) 385, 399 (1841). Evans, C. J., says: "But the plaintiff is neither a stranger nor a passenger, and if he can recover, it must be in his hermaphrodite character as a passenger fireman."

[77] Farwell *v.* Boston & Worcester Ry., 4 Met. (Mass.) 49 (1842). See argument of plaintiff's counsel at pp. 51–53.

[78] Bartonshill Coal Co. *v.* Reid, 3 Macq. 266, 285 (1858). He adds: "The law, as established in England, is founded on principles of universal application, not on any peculiarities of English jurisprudence; and unless there has been a settled course of decision in Scotland to the contrary, I think it would be most inexpedient to sanction a different rule to the north of the Tweed from that which prevails to the south." He then proceeds to a consideration of Scotch decisions and finds that each one would have been decided as it was, had it come before an English court — the negligence of the fellow servant having been in respect to a duty which the master delegated to a servant at his peril.

Fowler, afterwards fully discussed in the same Court in Hutchinson *v.* The York, Newcastle, & Berwick Railway Company, and acted on by the same Court in Wigmore *v.* Jay. Those decisions would not, it is true, be binding on your Lordships if the ground on which they rested were unsound, but the circumstance of their having been acquiesced in affords a strong argument to show that they have been approved of; more especially as in the first two cases the question appeared on the record, and might have been brought before a Court of Error."

On the same occasion Lord Chancellor Chelmsford, when concurring with Lord Cranworth's conclusion that there was no real difference in the law of England and Scotland on this topic, remarked: [79]

"The decisions upon the subject in both countries are of recent date, but the law cannot be considered to be so; the principles upon which these decisions depend must have been lying deep in each system, ready to be applied when the occasion called them forth."

If anyone fancies that the learned Lords, who decided the cases last cited, were partisans of the employer class, let him read for disillusionment the cases of Patterson *v.* Wallace & Co.,[80] and Brydon *v.* Stewart.[81]

Persons who criticize the courts for the fellow-servant doctrine forget (possibly they do not know) that the common-law liability of the master for the negligence of his servant rests upon judicial decisions, and that it was not fully established in its present broad form until the nineteenth century.[82] Indeed, the leading cases upon this topic, those in which the principles underlying the doctrine are most fully and satisfactorily expounded, are also the leading cases in the fellow-servant group.[83] Now it is quite certain that

[79] Bartonshill Coal Co. *v.* McGuire, 3 Macq. 310 (1858).

[80] 1 Macq. 748, 750, 758 (1854). In Vose *v.* Lancashire & Yorkshire Ry. Co., 2 H. & N. 728, 734 (1858), Pollock, C. B., said: "The law must have been the same long before it was enunciated in Priestley *v.* Fowler. If not, such actions would have been of frequent occurrence."

[81] 2 Macq. 30, 35, 38 (1855).

[82] See Wigmore, Responsibility for Tortious Acts: Its History, 7 HARV. L. REV. 383–405.

[83] Lord Justice Brett declared that Hutchinson *v.* York, Newcastle & Berwick Ry. Co., 5 Exch. 343 (1850), "is always considered the leading case on the subject" of master's liability, as well as on the fellow-servant topic. Employer's Liability Report to Parliament, 1877, p. 115. Among the leading cases in this country are, without doubt, Murray *v.* Railroad Co., 1 McMul. (S. C.) 385 (1841); Farwell *v.*

the general doctrine of the master's liability for the negligence of his servant, under modern common law, is not one which operates in favor of the employer. On the contrary it subjects him to a heavier burden than is laid upon him in most systems of jurisprudence. And yet that doctrine was developed and has been maintained by the very courts that are charged with creating the fellow-servant rule out of their zealous tenderness for the employer. Our courts are criticized for a harshness of doctrine towards the employee, not found in the judicial decisions of Continental states. Have they ever been praised for a harshness towards the employer, which is likewise absent from such decisions?

It would be a strange situation, surely, if the courts were at the same time enemies and partisans of the employer class. Is it not more probable that they were neither enemies nor partisans; but that, in formulating the general doctrine of the master's liability to strangers as well as the special fellow-servant doctrine, they were striving to do what seemed to them right and wise? They may have erred. Is there any evidence that they were actuated by discreditable or selfish motives?

The writer holds no brief for the impeccability of judges or the infallibility of courts.[84] But a careful and, he trusts, a candid study of the decisions of English and American courts during many years, has convinced him that the body of law thus developed is not the expression of class selfishness. On the contrary it seems to him an honest, and in the main an adequate system of principles under which justice can be fairly administered between litigants without respect to class, or rank, or condition.

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Boston & Worcester Ry., 4 Met. (Mass.) 49 (1842); Coon *v.* Syracuse & Utica Ry., 6 Barb. (N. Y.) 231, 238 (1849); Ryan *v.* Cumberland Valley R. Co., 23 Pa. St. 384 (1854).

[84] See Walter D. Coles, "Politics and the Supreme Court of the United States," 27 Am. L. Rev. 182.